82-188

No. .....

Office - Supreme Court, U.S.
FILED
AUG 4 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OKLAHOMA,
Petitioner,

v.

CECIL DEJUAN HARRIS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

SUSAN TALBOT
Assistant Attorney General
Chief, Appellate Criminal Division

ROBERT C. SMITH, JR.
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Petitioner

August, 1982

QUESTION PRESENTED FOR REVIEW

Whether the state court's ruling below, which held that an accused's Fifth Amendment right to remain silent is violated when he is cross-examined concerning why he has waited until trial to assert his exculpatory explanation (alibi defense), is in contravention of this Court's holding in *Fletcher* v. *Weir* and other recent decisions interpreting an accused's right to remain silent under the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED ____ i

OPINION BELOW ____ 1

JURISDICTION ____ 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ____ 2

STATEMENT OF THE CASE ____ 3

REASONS FOR GRANTING THE WRIT ____ 8

The State Court's Ruling in This Case, Which Held That an Accused's Fifth Amendment Right to Remain Silent Is Violated When He Is Cross-Examined Concerning Why He Has Waited Until Trial to Assert His Exculpatory Explanation, Is in Contravention of This Court's Holding in *Fletcher* v. *Weir* and Other Recent Decisions Interpreting Whether an Accused's Right to Remain Silent Under the Fifth Amendment, Which Is Applicable to the States Through the Fourteenth Amendment, Has Been Violated When the Accused Is Cross-Examined Concerning His Post-Arrest Silence ____ 8

CONCLUSION ____ 12

APPENDIX A:
Opinion, Harris v. State, ____ P.2d ____, 53 O.B.A.J. 1387 (Okl.Cr. March 28, 1982)

APPENDIX B:
Petition for Rehearing, Harris v. State, ____ P.2d ____, 53 O.B.A.J. 1387 (Okl.Cr. March 28, 1982)

APPENDIX C:
Order Denying Petition for Rehearing and Directing the Issuance of Mandate, Harris v. State, ____ P.2d ____, 53 O.B.A.J. 1387 (Okl.Cr. Mar. 28, 1982)

TABLE OF AUTHORITIES

Cases PAGE(s)

Anderson v. *Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980) 11, 12

Doyle v. *Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) 9, 12

Fletcher v. *Weir*, 50 U.S.L.W. 3762 (1982) 7, 9, 10-11, 12

Harris v. *State*, ... P.2d ....., 53 O.B.A.J. 1387 (Okl.Cr. March 28, 1982) 1, 6-7, 8-9

Jenkins v. *Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) 12

State v. *Neal*, 604 P.2d 145 (Okl.Cr. 1979) 11

United States ex rel. Smith v. *Franzen*, 660 F.2d 237 (7th Cir. 1981), *cert. granted and remanded, sub nom. Lane* v. *Smith*, 50 U.S.LW.. 3963 (1982) 12

United States v. *Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) 9

United States Constitution

Amendment V 2

Amendment XIV, § 1 2

United States Code

28 U.S.C. § 1257(3) 1, 3-4

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1982

STATE OF OKLAHOMA,
Petitioner,

v.

CECIL DEJUAN HARRIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported as *Harris v. State*, ___ P.2d ___, 53 O.B.A.J. 1387 (Okl.Cr. May 28, 1982). See Appendix A.

JURISDICTION

Judgment of the Oklahoma Court of Criminal Appeals was entered on May 28, 1982. A timely petition for rehearing was filed June 3, 1982, and said application was denied on June 16, 1982. See Appendices B and C. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. § 1257(3) states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

During the early morning of either April 4, or April 5, 1979, Janet Waldrop, a thirteen (13) year old minor, was awakened by her mother's boyfriend, the defendant, who had been living with her mother for the past year and a half (Tr. 41, 43). The mother, prior to this time, had already left the house for work (Tr. 43). After awakening the child, the defendant had her follow him to another bedroom where he sexually assaulted the child (Tr. 43-47). Neither the victim's two (2) sisters nor her brother, who were sleeping in the same bedroom with her, were awakened by the incident (Tr. 43). After the sexual assault, the child cleaned herself and went back to sleep (Tr. 48, 49).

The incident was not reported until days later on April 17, 1979, when Janet told one of her teachers about the incident after the teacher inquired as to whether she was upset about something (Tr. 49, 56, 57). On April 24, 1979, Janet was examined by a physician (Tr. 34). His findings were consistent with the child's allegations that she had had a previous sexual relationship (Tr. 36).

At trial, after the State had rested its case based upon the aforesaid facts, the defendant testified and, for the first time, proffered an alibi defense. The defendant alleged that during the week of April 2 through April 6 he left the home in the early morning each day (approximately between 5:00 a.m. and 5:30 a.m.) because he and his partner had to attend to some out-of-town business (Tr. 286, 287). The defendant also offered credit card gas receipts to bolster this defense (Tr. 307, 310). Although the defendant alleged that he drove his pickup truck on these trips accompanied by his partner, the gasoline receipts contained the license tag number of his partner's car, and not the tag number of the defendant's pickup truck. Thus, the receipts did not contain any evidence which would verify the defendant's presence at the time of the purchases, even though the defendant's partner did testify and verify the defendant's story (Tr. 205-209). The defendant, however, admitted that on two of these mornings, he had left the home after the mother had left for work (Tr. 305).

On cross-examination, the prosecuting attorney questioned the defendant in the following manner with regard to his alibi:

> "Q. You've got all these receipts and you knew that you were out of town every day with Olen. Why didn't you save yourself all this grief and come forward with this evidence and save this whole proceeding?
>
> A. I keep saying it, I didn't understand when this charge was. That is why we pulled receipts for ten months.
>
> BY MR. WARREN: Just answer the question, Bud.

BY THE WITNESS: Yes sir.

Q. (By Mr. Armstrong) When did you first learn that it was the first week of April that you allegedly committed this act?

A. The Preliminary Hearing.

Q. All right. That was in June; is that correct?

A. Yes, sir.

Q. Why haven't you come forward between June and now and saved yourself this ordeal?

A. To keep you from changing the date to a different date."
(Tr. 307, 308).

No objections were made by the defense counsel to this line of questioning by the prosecuting attorney. In fact, on redirect examination the defense counsel continued this line of questioning:

"Q. (By Mr. Warren) All right, Mr. Armstrong asked you why you did not come forward. Has this information been provided at the request of an attorney? I'm talking about the receipts and all this business establishing the days.

A. Yes.

Q. In fact, I requested them myself once we found out what week they were talking about.

A. Yes, sir.

Q. And did you rely solely upon what I told you to do from there on?

A. Yes, sir.

Q. Did I, at any time, mention to you to bring this stuff down to the District Attorney's Office?

A. No, sir.

Q. In fact, I told you, correct me if I am wrong, I told you, let's hang onto the receipts and all this business so that we have got it established because the dates may change if we don't.

A. Yes, sir.

Q. And, in fact, I told you that at the Preliminary Hearing; is that correct?

A. Yes, sir."
(Tr. 310, 311).

Thereafter, the case was submitted to the jury, who found the defendant guilty and assessed punishment at five (5) years imprisonment. The defendant asserted on appeal that the prosecutor's questioning regarding the defendant's post-arrest silence was a denial of due process as guaranteed by the Oklahoma Constitution and the United States Constitution, although he never objected at trial to this questioning and, in fact, continued this line of questioning on redirect examination. The Oklahoma Court of Criminal Appeals reversed and remanded the case for a new trial, holding that the questioning of the defendant by the prosecuting attorney concerning why the defendant had waited until trial to assert his alibi defense was "a direct assault on the [defendant's] exercise of his right to remain silent." *Harris*, 53 O.B.A.J. at 1388. The Oklahoma Court of Criminal Appeals based its reversal upon the Fifth Amendment to the United States Constitution rather than upon state grounds. The Oklahoma Court of Criminal Appeals stated in its opinion:

"Although we have not had occasion to address the precise issue, it seems clear to us that any comment or reference to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination. The Fifth Amendment to the United States Constitution allows an accused to remain silent during every stage of a criminal proceeding. *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). He may not be coerced into relinquishing this right to silence by any means, either physical or mental. *Id.* at 448. Nor may any penalty be exacted for an accused's failure to give up his right to remain silent. *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)." *Harris*, 53 O.B.A.J. at 1387.

The State filed a Petition for Rehearing on June 10, 1982, requesting the Oklahoma Court of Criminal Appeals to reconsider its opinion in light of this Court's decision in *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982), since, as in *Weir*, the defendant here was not given any governmental assurances that his pre-trial silence would not be used against him, and in light of other recent decisions of this Court interpreting whether an accused's right to remain silent has been violated by cross-examination of the accused concerning his post-arrest silence.

REASON FOR GRANTING THE WRIT

THE STATE COURT'S RULING IN THIS CASE, WHICH HELD THAT AN ACCUSED'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT IS VIOLATED WHEN HE IS CROSS-EXAMINED CONCERNING WHY HE HAS WAITED UNTIL TRIAL TO ASSERT HIS EXCULPATORY EXPLANATION, IS IN CONTRAVENTION OF THIS COURT'S HOLDING IN *FLETCHER* v. *WEIR* AND OTHER RECENT DECISIONS INTERPRETING WHETHER AN ACCUSED'S RIGHT TO REMAIN SILENT UNDER THE FIFTH AMENDMENT, WHICH IS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, HAS BEEN VIOLATED WHEN THE ACCUSED IS CROSS-EXAMINED CONCERNING HIS POST-ARREST SILENCE.

The Oklahoma Court of Appeals in its opinion in *Harris* v. *State*, ___ P.2d ___, 53 O.B.A.J. 1387 (Okl.Cr. March 28, 1982), concluded that the defendant was denied due process of law guaranteed by the Fourteenth Amendment when the prosecutor used the defendant's post-arrest silence for impeachment purposes. The state appellate court phrased the issue as a constitutional issue, although it did not appear from the record that the defendant was immediately read his *Miranda* warning:

> "Although we have not had occasion to address the precise issue, it seems clear to us that any comment or reference to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination. The Fifth Amendment to the United States Constitution allows an accused to remain silent during every stage of a criminal proceeding. *Miranda* v. *Arizona*, 384 U.S. 435, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). He may not be coerced into relinquishing this right to silence by

> any means, either physical or mental. *Id.* at 448. Nor may any penalty be exacted for an accused's failure to give up his right to remain silent. *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)."
>
> *Harris*, 53 O.B.A.J. at 1387.

Moreover, the state court held:

> "The prosecutor's questions in this case were more than the tangential infringement upon Fifth Amendment rights which occurred in *Runnels* and *Boomershine*. Rather, they were a direct assault on the appellant's exercise of his right to remain silent." *Id.* at 1388.

The opinion by the Oklahoma Court of Criminal Appeals directly conflicts with this Court's opinion in *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982), and for that reason this Writ should be granted.

This Court in *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982), determined that the Court of Appeals in that case "gave an overly broad reading" to the Court's decision in *Doyle* v. *Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), because the Court of Appeals concluded that a defendant could not be impeached by the use of his post-arrest silence even if no *Miranda* warnings had been given. In *Doyle*, this Court had ruled that its decision in *United States* v. *Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), extends to state criminal prosecution, and thus, the Court held that due to the nature of a *Miranda* warning it would be a violation of due process for the states to allow comment on silence which the warnings may well have encouraged. In *Weir*, this Court again took the oppor-

tunity to reiterate that "[the Court has] consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Weir*, 50 U.S.L.W. at 3762. "In the absence of the sort of affirmative assurance embodied in the *Miranda* warnings," the Court held, no constitutional impropriety occurs in permitting cross-examination concerning post-arrest silence when a defendant chooses to take the stand. *Id.* at 3762-63.

Like the Court of Appeals in *Weir*, the Oklahoma Court of Criminal Appeals here, has also given the defendant's rights under the Fifth Amendment an "overly broad reading" because in the instant case, as in *Weir*, the record is void of any evidence that the defendant was given the *Miranda* warning immediately at the time of his arrest, or any other governmental assurances that his silence would not be used against him. Further, the state appellate court's statements that, "any comment or references to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination" and the "Fifth Amendment . . . allows an accused to remain silent during every stage of a criminal proceeding" are similar to the Court of Appeals' statement in *Weir*, that, "it is inherently unfair to allow cross-examination concerning post-arrest silence," which this Court has rejected as an inaccurate statement of the protection afforded to the accused by the Fifth Amendment. *Weir*, supra.

Evidently, like the Court of Appeals in *Weir*, the Oklahoma appellate court incorrectly surmised that "an arrest, by itself, is governmental action which implicitly in-

duces a defendant to remain silent." *Weir*, 50 U.S.L.W. at 3762.[1]

The facts of the instant case and *Weir* are remarkably similar. In both cases, the records do not indicate that any governmental assurances were given to the defendants that their silence would not be used against them and the cross-examinations concerned instances where the defendants' in-court statements represented the first occasions at which the defendants had offered their exculpatory explanations to the charges. There can only be one conclusion that the Oklahoma court's decision below in the instant case stands in conflict with this Court's decision in *Fletcher* v. *Weir*.

Moreover, the purpose of the questioning in the instant case was not designed to draw meaning from the defendant's silence itself, but rather was meant to test the veracity of the defendant's exculpatory explanation. See *Anderson* v. *Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed. 2d 222 (1980). Thus, as asserted by the State in its Petition for Rehearing, the threshold issue is not the defendant's right to remain silent, but rather, is the credibility of the defendant's exculpatory explanation which he had asserted for the first time at trial.

To conclude, although the Oklahoma court may formulate its own evidentiary ruling regarding the issue here,

---

[1] For another case which evidences an overly broad reading given to an accused's rights under the Fifth Amendment by the Oklahoma appellate court, see *State* v. *Neal*, 604 P.2d 145, 146-47 (Okl.Cr. 1979), wherein the Oklahoma court stated:

"It is clear that there are no circumstances under which impeachment by reference to a defendant's silence is a constitutional procedure."

see *Weir*, supra, the court below chose to rule based upon federal constitutional law. Thus, since the decision below is in direct conflict with this Court's interpretation of constitutional law on the same point, as pronounced by this Court in *Fletcher* v. *Weir* and other post-*Doyle* decisions of the Court, see *Jenkins* v. *Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), and *Anderson* v. *Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), this Court should grant the petitioner's request for a Writ of Certiorari in order to correct the Oklahoma court's misinterpretation of federal constitutional law on this issue regarding an accused's right to remain silent under the Fifth Amendment. In fact, just recently, in *United States ex rel. Smith* v. *Franzen*, 660 F.2d 237 (7th Cir. 1981), *cert. granted and remanded, sub nom. Lane* v. *Smith*, 50 U.S.L.W. 3963 (1982), a case factually similar to the case at bar, this Court granted certiorari and remanded the case to the court below for reconsideration in light of *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982). Accordingly, the petitioner respectfully requests the Court to grant certiorari in the instant case.

CONCLUSION

While Rule 17 of this Court, by its own terms, is not exclusive in setting out grounds for the exercise of the Court's discretionary jurisdiction, as requested here, it does provide guidance to the importance of the cases this Court will consider. As indicated by the petitioner's argument hereinbefore stated, the petitioner has asserted one of the reasons enumerated in Rule 17 for exercising this Court's discretionary jurisdiction, in that, the petitioner contends that the Oklahoma appellate court has decided a substan-

tial federal question in conflict with applicable decisions of this Court. Consequently, as in *Lane* v. *Smith*, supra, certiorari should be granted in the instant case.

Respectfully submitted,

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

SUSAN TALBOT
Assistant Attorney General
Chief, Appellate Criminal Division

ROBERT C. SMITH, JR.
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Petitioner

August, 1982